

APPEAL NO. 180291
FILED MARCH 21, 2018

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 11, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), extends to a right shoulder rotator cuff tear and bursitis; (2) the respondent (claimant) has not reached maximum medical improvement (MMI); (3) because the claimant has not reached MMI, an impairment rating (IR) cannot be determined; and (4) (Dr. K) was appointed as a second designated doctor in accordance with Section 408.0041 and 28 TEX. ADMIN. CODE § 127.1 (Rule 127.1).

The appellant (carrier) appealed the ALJ's determinations regarding extent of the compensable injury, MMI, IR and that Dr. K was appointed as a second designated doctor in accordance with the 1989 Act and Rule 127.1 and argued further that the ALJ erred in refusing to admit Carrier's Exhibit L into evidence and abused his discretion in refusing to add the issue of finality of the first valid certification of MMI and assignment of IR.

The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part by striking.

It is undisputed that the claimant sustained a compensable injury to his right shoulder on (date of injury). The parties stipulated, in part, that the compensable injury includes at least a right shoulder sprain/contusion.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

EXTENT OF INJURY

The ALJ's determination that the compensable injury extends to a right shoulder rotator cuff tear and bursitis is supported by sufficient evidence and is affirmed.

EXCLUSION OF CARRIER'S EXHIBIT L

To obtain a reversal of a judgment based on the ALJ's abuse of discretion in the admission or exclusion of evidence, an appellant must first show the admission or exclusion was, in fact, an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. *Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the ALJ acted without reference to any guiding rules or principles. Appeals Panel Decision 051705, decided September 1, 2005; *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex.1986). Because the evidence established neither that Carrier's Exhibit L was timely exchanged, nor that there was good cause for the carrier's untimely exchange, we hold the ALJ did not err in excluding such exhibit.

REFUSAL TO ADD ISSUE

Included in the appeal file, although not admitted into evidence, is a response to the benefit review officer's report and Motion to Add Issue filed by the carrier on Friday, December 8, 2017, three days prior to the CCH, requesting addition of an issue concerning whether the first certification of MMI and assignment of IR by (Dr. M) dated February 23, 2017, had become final under Section 408.123 and Rule 130.12(a). The carrier also urged the motion at the CCH; however, the ALJ denied the carrier's motion to add the issue.

Rule 142.7(a) provides, in part, that a dispute not expressly included in the statement of disputes will not be considered by the ALJ. In accordance with Rule 142.7(b), the statement of disputes for a hearing held after a benefit review conference (BRC) includes the benefit review officer's report, identifying the disputes remaining unresolved at the close of the BRC; the parties' responses, if any; additional disputes by unanimous consent, as provided by Rule 142.7(c); and additional disputes presented by a party, as provided by Rule 142.7(d) and (e), if the ALJ determines that the party has good cause. Under Rule 142.7(c), a party may submit a response to the disputes identified as unresolved in the BRC report, and that response shall be in writing; describe and explain the party's position on the unresolved dispute or disputes; be sent to the Texas Department of Insurance, Division of Workers' Compensation no later than 20 days after receiving the BRC report; and be delivered to all other parties, as provided by Rule 142.4 of this title (relating to Delivery of Copies to All Parties). Rule 142.7(e) provides, in part, that a party may request the ALJ to include in the statement of disputes one or more disputes not identified as unresolved in the BRC report, and the

ALJ will allow such amendment only on a determination of good cause. Also in accordance with Rule 142.7(e), that request must be filed no later than 15 days prior to the hearing. The second BRC in this case was conducted on June 26, 2017. As mentioned above, the carrier's request to add the finality issue under Rule 142.7(e) was filed on December 8, 2017, more than five months following the second BRC.

The carrier argues that the issue of finality of the first MMI/IR certification from Dr. M was not ripe for adjudication at the time of the first BRC on April 26, 2017. However, the carrier's Notification of [MMI]/First Impairment Income Benefit Payment (PLN-3) sent to the claimant based upon Dr. M's certification is dated March 1, 2017. The second BRC was held on June 26, 2017, and the carrier did not file its response to the BRC report until December 8, 2017. Under the facts of this case, we find no error in the ALJ's denial of the carrier's motion to add the requested finality issue and we hold that the ALJ did not abuse his discretion in so ruling.

MMI/IR

The ALJ's determinations that the claimant has not reached MMI and that, for such reason, an IR cannot be assigned are supported by sufficient evidence and are affirmed.

APPOINTMENT OF DR. K AS DESIGNATED DOCTOR

Among the issues certified at the BRC for resolution and as stated in the ALJ's decision is:

4. Was [Dr. K] appointed as a second designated doctor in accordance with [Section 408.0041] and Rule 127.1?

As noted by the ALJ in the Discussion section of his decision, the issue of whether Dr. K was appointed to serve as designated doctor in accordance with Section 408.0041 and Rule 127 was previously litigated at a CCH in this claim on July 12, 2017, resulting in a Decision and Order signed by the ALJ on July 24, 2017, determining that Dr. K was appointed to serve as designated doctor in accordance with the 1989 Act and Rules, which Decision and Order has become final.

The ALJ noted further in the Discussion section that "an element of *res judicata*" applies to the case because the issue had been previously litigated, in most respects, and involved, essentially, the same arguments and contentions as those propounded in this case. Indeed, it appears the only difference in the issue as litigated at the December 11, 2017, CCH is the addition of the word "second" prior to the words "designated doctor" in the issue as stated in the July 12, 2017, CCH. We hold the ALJ

did not have jurisdiction over the issue of whether Dr. K was appointed as a second designated doctor in accordance with Section 408.0041 and Rule 127.1 at the December 11, 2017, CCH because the issue of whether Dr. K was appointed to serve as designated doctor in accordance with Section 408.0041 and Rule 127 had previously been determined at the July 12, 2017, CCH. That determination had become res judicata and the issue should not have been relitigated at the December 11, 2017, CCH. We accordingly render a new decision by striking the determination that Dr. K was appointed as a second designated doctor in accordance with Section 408.0041 and Rule 127.1 because the ALJ did not have jurisdiction over that issue at the December 11, 2017, CCH.

SUMMARY

We affirm the ALJ's determination that the compensable injury extends to a right shoulder rotator cuff tear and bursitis.

We affirm the ALJ's determinations that the claimant has not reached MMI and that the claimant's IR cannot be determined.

We reverse the ALJ's determination that Dr. K was appointed as a second designated doctor in accordance with Section 408.0041 and Rule 127.1 because the ALJ did not have jurisdiction to render a decision on that issue at the December 11, 2017, CCH. We render a new decision by striking the determination that Dr. K was appointed as a second designated doctor in accordance with Section 408.0041 and Rule 127.1 because the ALJ did not have jurisdiction over that issue at the December 11, 2017, CCH.

The true corporate name of the insurance carrier is **ACE AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge